

## **§ 228.8**

(f) Contemporaneous with the publication of the notice of hearing, the Assistant Administrator's direct testimony in support of the proposed regulations and waiver, where applicable, shall be available for public inspection as specified in the notice of hearing. The Assistant Administrator may submit additional direct testimony during the time periods allowed for submission of such testimony by witnesses.

### **§ 228.8 Mailing address.**

Unless otherwise specified in the notice of hearing, all direct testimony shall be addressed to the Presiding Officer, c/o Assistant Administrator, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910. All affidavits and exhibits shall be clearly marked with the docket number of the proceedings.

### **§ 228.9 Inspection and copying of documents.**

Any document in a file pertaining to any hearing authorized by this subpart or any document forming part of the record of such a hearing may be inspected and/or copied in the Office of the Assistant Administrator, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910—unless the file is in the care and custody of the presiding officer, in which case the presiding officer shall notify the parties as to where and when the record may be inspected.

### **§ 228.10 Ex parte communications.**

(a) After notice of a hearing is published in the FEDERAL REGISTER, all communications, whether oral or written, involving any substantive or procedural issue and directed either to the presiding officer or to the Assistant Administrator, Deputy Assistant Administrator, or Chief of the Marine Mammal Division, National Marine Fisheries Service, without reference to these rules of procedure, shall be deemed ex parte communications and are not to be considered part of the record for decision.

(b) A record of oral conversations shall be made by the persons who are contacted. All communications shall be available for public viewing at the

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place(s) specified in the notice of hearing.

(c) The presiding officer shall not consult any person or party on any fact in issue or on the merits of the matter unless notice and opportunity is given for all parties to participate.

### **§ 228.11 Prehearing conference.**

(a) After an examination of all the direct testimony submitted pursuant to § 228.7, the presiding officer shall make a preliminary determination of issues of fact which may be addressed at the hearing.

(b) The presiding officer's preliminary determination shall be made available at the place or places provided in the notice of the hearing (§ 228.4(b)(8)) at least 5 days before the prehearing conference.

(c) The purpose of the prehearing conference shall be to enable the presiding officer to determine, on the basis of the direct testimony submitted and prehearing discussions:

(1) Whether the presiding officer's preliminary determination of issues of fact for the hearing has omitted any significant issues;

(2) What facts are not in dispute;

(3) Which witnesses may appear at the hearing; and

(4) The nature of the interest of each party and which parties' interests are adverse.

(d) Only parties may participate in the hearing conference and a party may appear in person or be represented by counsel.

(e) Parties who do not appear at the prehearing conference shall be bound by the conference's determinations.

### **§ 228.12 Final agenda of the hearing.**

(a) After the prehearing conference, the presiding officer shall prepare a final agenda which shall be published in the FEDERAL REGISTER within 10 days after the conclusion of the conference. A copy of the final agenda shall be mailed to all parties.

(b) The final agenda shall list:

(1) All the issues which the hearing shall address, the order in which those issues shall be presented, and the direct testimony submitted which bears on the issues; and

(2) A final date for submission of direct testimony on issues of fact not included in the notice of hearing if such issues are presented. The final agenda may also specify a final date for submission of direct testimony to rebut testimony previously submitted during the time specified in the notice of the hearing.

(c) The presiding officer shall publish with the final agenda a list of witnesses who may appear at the hearing, a list of parties, the nature of the interest of each party, and which parties' interests are adverse on the issues presented.

**§ 228.13 Determination to cancel the hearing.**

(a) If the presiding officer concludes that no issues of fact are presented by the direct testimony submitted, the presiding officer shall publish such conclusion and notice in the FEDERAL REGISTER that a hearing shall not be held and shall also publish a date for filing written comments on the proposed regulations. Written comments may include proposed findings and conclusions, arguments or briefs.

(b) A person need not be a party to submit any written comments.

(c) Promptly after expiration of the period for receiving written comments, the presiding officer shall make a recommended decision based on the record, which in this case shall consist of the direct testimony and written comments submitted. He shall transfer to the Assistant Administrator his recommended decision, the record and a certificate stating that the record contains all the written direct testimony and comments submitted. The Assistant Administrator shall then make a final decision in accordance with these regulations (§ 228.21).

**§ 228.14 Rebuttal testimony and new issues of fact in final agenda.**

(a) Direct testimony to rebut testimony offered during the time period specified in the notice of hearing may be submitted pursuant to these regulations within fifteen days after the conclusion of the prehearing conference unless the presiding officer otherwise specifies in the final agenda.

(b) If the final agenda presents issues not included in the notice of the hearing published pursuant to § 228.4:

(1) Any person interested in participating at the hearing on such issues presented shall notify the Assistant Administrator by certified mail of an intent to participate not later than 10 days after publication of the final agenda. Such person may present direct testimony or cross-examine witnesses only on such issues presented unless that person previously notified the Assistant Administrator pursuant to § 228.5; and

(2) Additional written direct testimony concerning such issues may be submitted within the time provided in the final agenda. Such direct testimony will comply with the requirements of § 228.7.

**§ 228.15 Waiver of right to participate.**

Persons who fail to notify the Assistant Administrator pursuant to §§ 228.5 and 228.14 shall be deemed to have waived their right to participate as parties in any part of the hearing.

**§ 228.16 Conduct of the hearing.**

(a) The hearing shall be held at the time and place fixed in the notice of the hearing, unless the presiding officer changes the time or place. If a change occurs, the presiding officer shall publish the change in the FEDERAL REGISTER and shall expeditiously notify all parties by telephone or by mail: Provided, that if that change in time or place of hearing is made less than 5 days before the date previously fixed for the hearing, the presiding officer shall also announce, or cause to be announced, the change at the time and place previously fixed for the hearing.

(b) The presiding officer shall, at the commencement of the hearing, introduce into the record: the notice of hearing as published in the FEDERAL REGISTER; all subsequent documents published in the FEDERAL REGISTER; the draft Environmental Impact Statement if it is required and the comments thereon and agency responses to the comments; and a list of all parties. Direct testimony shall then be received with respect to the matters specified in the final agenda in such order as the presiding officer shall announce. With